



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hayes International Corporation--Request
for Reconsideration

File: B-224567.2

Date: March 6, 1987

DIGEST

Original decision is affirmed where protester in request for reconsideration fails to show error of law or fact in original finding that protester was no longer entitled to be considered for award under request for proposals where protester was suspended from government contracting before best and final offers were due, and contracting agency did not make written finding under applicable regulation that compelling reason existed for continued consideration of -- protester's proposal.

DECISION

Hayes International Corporation requests reconsideration of our decision in Hayes International Corp., B-224567, Feb. 4, 1987, 87-1 CPD ¶ , denying Hayes' protest of the award of a contract to any other offeror under request for proposals (RFP) No. F34601-87-R-49000, issued by the Air Force for programmed depot maintenance of KC-135 aircraft. We affirm our original decision.

Hayes, an offeror under the KC-135 RFP, was suspended from future government contracting on July 2, 1986, after discussions had been held under the RFP, but before best and final offers were due. As described in the report by the Air Force's Debarment and Suspension Board, the suspension was based on findings in a Navy investigation regarding unacceptable performance by Hayes under Navy aircraft maintenance contracts; concerns regarding the quality of Hayes' performance and other apparent irregularities, such as inadequate billing practices, raised during a federal task force investigation of Hayes begun in 1984; and a pending grand jury investigation of Hayes' performance which stemmed from the 1984 task force investigation.

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Despite its suspension, Hayes submitted a best and final offer under the KC-135 RFP by the July 21 due date. The suspension later was lifted on September 29, the same day the Air Force source selection authority decided to award a contract under the RFP to an offeror other than Hayes; actual award of the contract took place on October 2.

In its original protest, Hayes challenged the Air Force's reliance on the suspension and related events as the basis for its decision not to award a contract to Hayes under the RFP. We denied the protest based on our finding that Hayes was no longer entitled to further consideration for award under the RFP once the suspension was imposed. As a result, we did not reach the issue whether the Air Force acted properly in relying on the suspension and related events in its consideration of the Hayes proposal.

Our finding regarding the impact of the suspension on Hayes' eligibility for award under the KC-135 RFP was based on the Department of Defense (DOD) Federal Acquisition Regulation (FAR) Supplement, 48 C.F.R. § 209.405(a)(1) (1985), which provides in relevant part:

"Proposals, quotations or offers received from any [contractor on the consolidated list of debarred or suspended contractors] shall not be evaluated for award or included in the competitive range, and discussions shall not be conducted with such offeror, unless the Secretary concerned or his authorized representative determines in writing that there is a compelling reason to make an exception."

In our view, under this regulation, once a suspension is imposed on an offeror in the course of a negotiated procurement, the offeror loses any right to further consideration for award, unless the contracting agency makes a written finding that a compelling reason exists for keeping the offeror in the competition. Here, the Air Force did not make the written determination called for by the regulation; on the contrary, in its report on the protest, the Air Force stated that the contracting officials erred in continuing to consider the Hayes proposal after the suspension took effect. Accordingly, we held that Hayes was no longer entitled to further consideration for award under the RFP once the suspension was imposed.

In its request for reconsideration, Hayes argues that a written finding is not a prerequisite under the DOD FAR Supplement provision to continued consideration of a

suspended contractor, and that the Air Force's actions after the suspension was imposed were tantamount to an implicit finding that a compelling reason existed for consideration of the Hayes proposal. Specifically, Hayes contends that the Air Force's goal was to maintain Hayes as a competitor for the KC-135 and other contracts, and to that end the Air Force worked with Hayes to reach a settlement agreement which would allow expeditious lifting of the July 2 suspension. In addition, Hayes argues that the fact that the Air Force proceeded to evaluate the Hayes best and final offer after the suspension took effect confirms the Air Force's intention to keep Hayes in the KC-135 competition.^{1/}

As support for its position, Hayes relies on Bauer Compressors, Inc., 63 Comp. Gen. 303 (1984), 84-1 CPD ¶ 458, in which we held that the Air Force properly could make award to a suspended contractor whose suspension, in effect at time of bid opening, was lifted prior to award. The regulation at issue in Bauer provided for rejection of a bid from a suspended contractor, unless the contracting agency made a written finding that there was a compelling reason to make an exception. In part, we found that, although no written finding had been made justifying consideration of the awardee's bid, the Air Force's decision to enter into a plea agreement and consent judgment with the contractor, together with the subsequent lifting of the suspension, were sufficient to establish a compelling reason for not rejecting the awardee's bid.

In our view, Bauer clearly is distinguishable from this case. In Bauer, it was reasonable to interpret the Air Force's actions as an implicit finding that a compelling reason existed not to reject the suspended contractor's bid since that interpretation was consistent with the Air Force's decision to make award to the contractor. Here, in contrast, the Air Force decided not to make award to Hayes, and in

^{1/} In support of its position that the Air Force implicitly waived Hayes' ineligibility for award after the suspension took effect, Hayes states that the Air Force, although knowing of the suspension, nevertheless asked Hayes to submit a best and final offer. The record shows, however, that best and final offers were requested by letter dated June 23; the suspension was not imposed until July 2. In addition, Hayes states that the source selection authority deliberately waited until the suspension was lifted to make the award decision. The selection decision was made and the suspension lifted on the same day, September 29. The record is unclear, however, as to whether the source selection authority knew the suspension had been lifted before the selection decision had been made and the award action initiated.

fact states that the contracting officials erred in not eliminating Hayes from further consideration once the suspension took effect. Thus, unlike in Bauer, we do not interpret the Air Force's actions here as an implicit finding under the DOD FAR Supplement that a compelling reason existed for continuing to consider the Hayes proposal.

Hayes also challenges our conclusion that it was not entitled to further consideration under the RFP even though the suspension was lifted before the actual award was made. As discussed above, the source selection authority made the selection decision on September 29, the same day the suspension was lifted; actual award was made on October 2. Even assuming, as Hayes argues, that the source selection authority waited until the suspension was lifted before making the selection decision,^{2/} it is not reasonable in our view to interpret the DOD FAR Supplement provision to require the Air Force to reinstate Hayes in the competition at that time, since the lifting of the suspension came so late in the KC-135 procurement.

As support for this conclusion in our original decision, we relied on Tracor Applied Sciences, Inc., B-221230.2, et al., Feb. 24, 1986, 86-1 CPD ¶ 189, in which we held that the contracting officer properly rejected a suspended bidder whose suspension was lifted 2 days before award was made, since the contracting officer was unaware that the suspension had been lifted. Tracor establishes that the lifting of a suspension does not necessarily divest the contracting officer of all discretion with regard to consideration of suspended contractors, or require putting suspended contractors on equal footing with other offerors as soon as a suspension is lifted. Thus, in this case, where the suspension was lifted the same day as the selection decision was made, the Air Force was not required to further delay the award decision, which had already consumed several months, in order to accommodate consideration of the Hayes proposal.

In view of our conclusion that Hayes was no longer entitled to further consideration for award once the suspension was imposed, our original decision did not address Hayes' argument that the Air Force improperly relied on the settlement agreement and related events to downgrade the Hayes proposal. Even if we consider Hayes' argument on the merits, however, we see no basis on which to object to the Air Force's conclusion that the problems underlying Hayes' suspension and

^{2/}As discussed in note 1, supra, the record is unclear as to whether the lifting of the suspension preceded the source selection authority's selection decision.

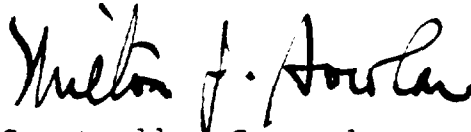
related events warranted a significant reduction in Hayes' rating. In reviewing challenges to a contracting agency's technical evaluation, we do not reevaluate the proposals or make our own determination on their merits; rather, we review the record to determine whether the agency's evaluation was reasonable and in accordance with the evaluation scheme in the RFP. Bank Street College of Education, 63 Comp. Gen. 393 (1984), 84-1 CPD ¶ 607. Here, since an offeror's experience or past performance was listed as a subfactor under all four technical evaluation factors listed in the RFP, it clearly was consistent with the evaluation scheme for the Air Force to consider Hayes' past performance problems in evaluating its proposal.

In addition, based on the record as a whole, we think the Air Force's determination regarding the impact of the suspension and related events on Hayes' rating was reasonable. The Air Force concluded that two fundamental problems in connection with Hayes' past government contracts--"disregard for business ethics throughout the corporate structure" and "fraudulent actions"--adversely affected Hayes' rating under six subfactors under the first and most important evaluation factor in the RFP, management/experience, and four subfactors under the second evaluation factor, quality. The affected subfactors relate to the quality of Hayes' corporate personnel and organization, including its procurement, contract administration, supply management and quality control procedures; Hayes' cost control systems; and, most significantly, Hayes' past performance under similar maintenance contracts. In our view, the problem areas in Hayes' past performance identified by the Air Force based on the suspension and related events clearly have a direct bearing on these evaluation subfactors. In addition, the problems were sufficiently serious, as evidenced by the number and scope of concerns with Hayes' performance which surfaced as a result of the various investigations into Hayes, that the Air Force reasonably could decide to reduce Hayes' rating in the affected areas from acceptable to marginal.

Further, the decision to make award to Boeing represented a determination that the cost saving to be gained by awarding to Hayes was outweighed by Boeing's higher technical rating. Where, as here, an agency makes a tradeoff between price and technical considerations, the essential question is whether the determination to make award to a particular offeror is reasonable and consistent with the RFP's evaluation scheme. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. Accordingly, award to a higher rated, higher priced offeror is proper where the agency reasonably concludes that the technical difference is sufficiently significant to

outweigh the price difference. Prison Health Services, Inc., B-215613.2, Dec. 10, 1984, 84-2 CPD ¶ 643. In this case, the award to the higher rated, higher priced offeror was consistent with the evaluation scheme, which emphasized technical considerations over price and specifically reserved the right to make award at other than the lowest price. In addition, in view of our conclusion that Hayes' lower technical rating was reasonable, we see no basis to challenge the Air Force's determination that the advantages represented by Boeing's higher rating warranted award at a higher price.

Since Hayes has failed to show any error of law or fact in our original decision, that decision is affirmed.

for 
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of the United States